United Overseas Bank (M) Bhd v Tan Chong Whatt & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1037–06 OF 2022
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
7 APRIL 2025

Contract — Guarantee — 'Principal debtor' clause — Guarantors guaranteed to repay borrower's loan both as sureties as well as principal debtors — Borrower's liquidator fully settled amount owing to lender as at date of borrower's winding up — Lender as secured creditor was precluded by s 8(2A) Bankruptcy Act 1967 from claiming from borrower interest on loan accruing after date of winding up — Whether lender could recover the said interest from the loan guarantors in their capacity as principal debtors — Whether protection afforded to sureties under Contracts Act 1950 could not be applied to sureties who had also assumed responsibility as principal debtors

The respondents and another person ('Gerald Yeo') (collectively called 'the guarantors') had guaranteed to repay the appellant ('UOB') a RM30m loan it had granted to a company ('the borrower') to allow the latter to buy 170 shop lots in a shopping complex. The said shop lots ('the charged assets') were charged to UOB as additional security for the loan. On 4 December 2015, the High Court wound up the borrower and appointed a liquidator to take charge of its affairs. UOB also appointed receivers and managers ('R&Ms') to deal with the charged assets. In October 2017, the liquidator paid UOB RM30,499,923.60 due to it under the loan facility as at the date of the winding up order in order to redeem the charged assets. No interest on the loan after the date of the winding up order was paid to UOB pursuant to s 8(2A) of the Bankruptcy Act 1967 as it failed to realise the charged assets within six months of that date. Several months later, UOB demanded that the guarantors pay the interest on the loan that had accrued from the day after the making of the winding up order until the date the liquidator paid the redemption sum. The guarantors refused to pay contending that their liability ceased when the redemption sum was paid. UOB sued the guarantors for payment of accrued interest under the loan amounting to RM7,753,962.71. The High Court dismissed the claim. The instant appeal was against that decision.

Held, unanimously allowing UOB's appeal, setting aside the High Court's decision and entering judgment for UOB against the guarantors as prayed for:

(1) The guarantors were not just sureties to UOB but were contractually liable to pay the post-winding up accrued interest claimed by UOB as principal debtors. This was reflected in cll 19 and 20.1.4 of the

guarantee. The guarantors were not protected under s 8(2A) of the Bankruptcy Act 1967 as they did not fall within the meaning of 'debtor' as envisaged under the law. They also could not avail of ss 92 and/or 94 of the Contracts Act 1950 which were intended to protect only sureties and not sureties who had also assumed responsibility as principal debtors (see paras 28–36).

(2) Once it was established that a guarantor was no longer just a surety for a borrower but also a principal debtor of the bank, the protections afforded to a surety under the Contracts Act 1950 would not apply. As such, the High Court erred in finding that UOB's delay in appointing the R&Ms and its failure to promptly dispose of the charged assets constituted a breach of its duty to the guarantors (see paras 40–42).

(3) UOB had no right to retain or claim interest on the excess money from the proceeds of sale of the charged assets because it was not the party involved in the sale. It was the liquidator, on behalf of the borrower, who carried out the sale, received the sale proceeds and retained the surplus after paying off the redemption sum. As such, UOB was not in breach of any contractual obligation with respect to the proceeds of sale of the charged assets (see paras 38 & 45).

[Bahasa Malaysia summary

Responden dan seorang lagi ('Gerald Yeo') (secara kolektif dipanggil 'penjamin') telah memberi jaminan akan membayar balik perayu ('UOB') pinjaman RM30 juta yang telah diberikannya kepada sebuah syarikat ('peminjam') untuk membolehkannya membeli 170 lot kedai di sebuah kompleks beli-belah. Lot kedai tersebut ('aset yang digadai') telah digadai kepada UOB sebagai jaminan tambahan untuk pinjaman. Pada 4 Disember 2015, Mahkamah Tinggi menggulung peminjam dan melantik pelikuidasi untuk bertanggungjawab ke atas hal ehwalnya. UOB juga melantik penerima dan pengurus ('R&Ms') untuk berurusan dengan aset yang digadai. Pada Oktober 2017, pelikuidasi membayar UOB RM30,499,923.60 seharusnya dibayarnya di bawah kemudahan pinjaman setakat tarikh perintah penggulungan untuk menebus aset yang digadai. Tiada faedah ke atas pinjaman selepas tarikh perintah penggulungan dibayar kepada UOB menurut s 8(2A) Akta Kebankrapan 1967 kerana ia gagal merealisasikan aset yang digadai dalam tempoh enam bulan dari tarikh tersebut. Beberapa bulan kemudian, UOB menuntut penjamin membayar faedah ke atas pinjaman yang telah terakru dari hari selepas membuat perintah penggulungan sehingga tarikh pelikuidasi membayar jumlah penebusan. Penjamin enggan membayar dengan alasan bahawa liabiliti mereka dihentikan apabila jumlah penebusan dibayar. UOB menyaman penjamin untuk pembayaran faedah terakru di bawah pinjaman berjumlah RM7,753,962.71. Mahkamah Tinggi menolak tuntutan itu. Rayuan semasa adalah terhadap keputusan itu.

Diputuskan, sebulat suara membenarkan rayuan UOB, mengetepikan keputusan Mahkamah Tinggi dan memasukkan penghakiman untuk UOB terhadap penjamin seperti yang dimohon:

(1) Penjamin bukan sahaja cagaran kepada UOB tetapi bertanggungjawab secara kontrak untuk membayar faedah terakru selepas penggulungan yang dituntut oleh UOB sebagai penghutang utama. Ini ditunjukkan dalam klausa 19 dan 20.1.4 jaminan. Penjamin tidak dilindungi di bawah s 8(2A) Akta Kebankrapan 1967 kerana mereka tidak termasuk dalam pengertian 'penghutang' seperti yang diniatkan di bawah undang-undang. Mereka juga tidak dapat menggunakan ss 92 dan/atau 94 Akta Kontrak 1950 yang bertujuan untuk melindungi penjamin sahaja dan bukan penjamin yang juga telah memikul tanggungjawab sebagai penghutang utama (lihat perenggan 28–36).

(2) Sebaik sahaja dipastikan bahawa penjamin bukan lagi hanya penjamin bagi peminjam tetapi juga penghutang utama bank, perlindungan yang diberikan kepada penjamin di bawah Akta Kontrak 1950 tidak akan terpakai. Oleh itu, Mahkamah Tinggi terkhilaf apabila mendapati bahawa kelewatan UOB dalam melantik R&M dan kegagalannya untuk melupuskan aset yang digadai dengan segera merupakan pelanggaran kewajipannya kepada penjamin (lihat perenggan 40–42).

(3) UOB tidak mempunyai hak untuk mengekalkan atau menuntut faedah ke atas lebihan wang daripada hasil jualan aset yang digadai kerana ia bukan pihak yang terlibat dalam penjualan itu. Pelikuidasi, bagi pihak peminjam, yang menjalankan jualan, menerima hasil jualan dan mengekalkan lebihan selepas membayar jumlah penebusan. Oleh itu, UOB tidak melanggar mana-mana obligasi berkontrak berkenaan dengan hasil penjualan aset yang digadai (lihat perenggan 38 & 45).]

Cases referred to

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449, FC (folld)

Fisar bin Hj Abdullah v Malayan Banking Bhd [2015] 1 MLJ 867, CA (distd)

Holme v Brunskill (1878) 3 QBD 495, CA (refd)

Pilecon Realty Sdn Bhd v Public Bank Bhd & Ors and another appeal [2013] 3 MLJ 1, FC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967) s 8(2A)
Contracts Act 1950 ss 92, 94, 98

Appeal from: *United Overseas Bank (Malaysia) Bhd v Tan Chong Whatt & Ors* [2022] MLJU 1148 (High Court, Kuala Lumpur)

Vijay Raj (Ratna Govindasamy with him) (Skrine) in Civil Appeal Nos W-02(NCC)(W)-1036–06 of 2022 and W-02(NCC)(W)-1037–06 of 2022 for the appellants.

Ringo Low Kim Leng (Brandon Lim Zhung Wy with him) (Ringo Low & Assoc) in Civil Appeal No W-02(NCC)(W)-1037–06 of 2022 for the respondents.

Prem Rama Chandran (Craig Ho Wai Ping with him) (Kumar Partnership) in Civil Appeal No W-02(NCC)(W)-1036–06 of 2022 for the respondent.

Choo Kah Sing JCA:

INTRODUCTION

[1] This appeal emanates from a High Court decision dated 10 May 2022 wherein the learned High Court judge dismissed the appellant's claim.

[2] The appellant, United Overseas Bank (M) Bhd ('UOB'), claimed against the respondents premised on a guarantee dated 25 November 2014 ('the guarantee'). The guarantee was executed by the respondents together with two others, namely Gerald Yeo @ Yeo Ah Khe and Wang YingDe, who agreed to be jointly and severally liable for a loan facility granted to one CHN Commodity Trade Centre Sdn Bhd (in receivership/in liquidation) ('borrower') for a sum of RM30m ('the loan sum'). The loan sum was to facilitate the borrower to part finance the purchase of 170 shop units ('the charged assets') in a shopping complex.

[3] The heart of the contention in this appeal is whether the appellant could claim against the guarantors for the charges of accrued interest post winding up of the borrower. The claim was not the loan sum. In fact, the loan sum had been redeemed or paid off by the liquidator based on a redemption statement dated 30 October 2017 issued by UOB.

(Note: this appeal (W-02(NCC)(W)-1037–06 of 2022 ('Appeal 1037')) was heard together with another appeal W-02(NCC)(W)-1036–06 of 2022 ('Appeal 1036') wherein the appellant there was UOB, and the respondent was Gerald Yeo @ Yeo Ah Khe. The facts and issues for the two appeals were the same. On 26 August 2024, this court delivered only one decision which was binding on both appeals.)

BRIEF FACTS

[4] The borrower took a loan from UOB and secured it with several security documents, and one of them was the guarantee. On 27 November 2014, UOB issued a letter of notification to inform, inter alia, that the joint and several guarantee for the loan sum was to be executed by the respondents and Gerald

Yeo @ Yeo Ah Khe only. Wang YingDe had been released or discharged from the guarantee which he had signed earlier.

[5] On 4 December 2015, the borrower was wound up by the High Court of Kuala Lumpur (in a Winding-Up Suit No 28NCC-812–09 of 2015). The winding up petition was filed by the Joint Management Body of Complex Pandan Safari Lagoon. Tharma Iswara a/l S Subramaniam ('the liquidator') was appointed as the liquidator of the borrower.

[6] On 19 September 2016, UOB through its firm of solicitors Messrs Skrine wrote to the liquidator demanding the borrower to pay a sum of RM30,539,923.60 as the outstanding loan sum as at 4 December 2015 (the date of the winding up order). At the same time, UOB also demanded from the respondents (and Gerald Yeo @ Yeo Ah Khe) as guarantors to the borrower the sum of RM32,934,735.33 as at 4 September 2016 with running interest thereon at the rate of 3.5%pa above the base lending rate ('BLR') on monthly rests from 5 September 2016 until date of full payment. No payment was forthcoming from the borrower or the guarantors. UOB then took further action by invoking its right to appoint a receiver and/or manager to deal with the charged assets.

[7] Pursuant to the facilities agreement as well as the debenture both dated 25 November 2014, the filing of a winding up petition against the borrower would constitute as an event of default under the events of default clauses in both the security documents, namely cll 24.2.7 and 11.2.2.8 respectively.

[8] The winding up petition against the borrower was filed on 30 September 2015. As such, UOB was entitled under the debenture (cl 11.3.3) to appoint receiver(s) and or manager(s) to deal with the charged assets. The powers of the receiver(s) and or manager(s) were expressly stated in section 11.4 of the debenture. On 23 November 2016, UOB appointed one Dato' Heng Ji Keng and Mr Andrew Heng ('R&Ms') as the receivers and managers of the charged assets. The appointment of the R&Ms only took place on 23 November 2016, although UOB could have appointed the R&Ms as early as on 30 September 2015.

[9] After the appointment of the R&Ms, the affairs of the borrower were under the charge of the liquidator, and at the same time, the charged assets were under the charge of the R&Ms.

[10] On 23 March 2017, the liquidator informed UOB that it had received an offer from one Paradise Boulevard Sdn Bhd to purchase the charged assets for the sum of RM54m. However, UOB through the R&Ms rejected the offer and advised that the charged assets were under the responsibilities of the

R&Ms, and informed the liquidator that he was not authorised to deal with the charged assets. The R&Ms were of the opinion that the offered price to purchase the charged assets was grossly undervalued, and they believed that the market value for the charged assets was approximately the sum of RM87.57m based on a valuation report.

[11] The liquidator, instead of paying UOB for the borrower's outstanding loan sum as demanded earlier, then requested for a redemption statement for the outstanding loan. On 3 October 2017, UOB issued a redemption statement as at 4 December 2015 (which was the date of the winding up order) which stated that the outstanding sum was RM30,499,923.60 ('the redemption sum'). The liquidator paid the said redemption sum on 24 October 2017. The payment of the redemption sum actually came from the sale of the charged assets by the liquidator for a sum of RM54m. The balance of the proceeds amounting to RM23,500,076.40 was kept by the liquidator.

[12] Although the liquidator had redeemed the charged assets from UOB, and had paid the outstanding sum for the borrower, the said outstanding sum was calculated up to the date of the winding up of the borrower as at 4 December 2015. There still remained outstanding interest accrued between the period post winding up commencing from 5 December 2015 to the date of payment of the redemption sum on 24 October 2017, and interest continued to be chargeable until the date of full settlement.

[13] On 23 May 2018, UOB through its solicitors demanded from the respondents (and Gerald Yeo @ Yeo Ah Khe) the remaining outstanding interest that had accrued from the period post winding up until the date of settlement and chargeable interest which amounted to a sum of RM7,753,962.71 as at 5 May 2018, as well as interest which still continued to accrue at the rate of 3.5%pa above the BLR on monthly rests from 6 May 2018 until the date of full settlement.

[14] The respondents (and Gerald Yeo @ Yeo Ah Khe) did not pay UOB the demanded sum of RM7,753,962.71. As such, UOB filed the action at the court below against the respondents (and Gerald Yeo @ Yeo Ah Khe).

AT THE HIGH COURT

[15] The respondents (and Gerald Yeo @ Yeo Ah Khe), as guarantors, contended that UOB, as a secured creditor, had a duty to take prompt action to realise the charged assets when the borrower went into liquidation. According to the respondents, UOB's failure to do so had prejudiced the interests and compromised the rights of the respondents (and Gerald Yeo @ Yeo Ah Khe) as guarantors to the loan.

[16] The respondents (and Gerald Yeo @ Yeo Ah Khe) relied on the principle in *Holme v Brunskill* (1878) 3 QBD 495 that in the absence of the surety's consent, any material variation of the underlying contract to which the principal is party will discharge the surety from liability under the guarantee. The respondents (and Gerald Yeo @ Yeo Ah Khe) also relied on ss 92 and 94 of the Contracts Act 1950.

[17] The respondents (and Gerald Yeo @ Yeo Ah Khe) argued that upon the release of the charged assets and reassignment of the same to the liquidator, their responsibility and liability as guarantors would be discharged at the same time the borrower was discharged.

[18] However, UOB contended that, first, it was entitled to reassign (retransfer) the charged assets to the borrower through the liquidator upon the full settlement of the redemption sum of RM30,499,923.60 based on the redemption statement as at 3 October 2017. It further contended that UOB had no duty, right or obligation to retain the excess money from the sale proceeds for the benefit of the guarantors. Secondly, UOB relied on cl 10 of the guarantee which is in substance an anti-discharge clause. Clause 10 of the guarantee stated as follows:

> This Guarantee will not be affected in any way and We [the guarantors] will not be released or excused from any of Our liabilities or obligations under this Guarantee by any of the following:
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> ...
>
> > 10.1.7 any compromise, composition or arrangement which You [UOB] may make with the Customer [Borrower] and/or any other person, including Ourselves [the guarantors] and any party to any security document entered into with You whether or not You have given notice to Us or obtained Our consent;
> >
> > ...

[19] UOB relying on the above contentions further argued that it was entitled to claim against the guarantors for the outstanding interest accrued post winding up of the borrower.

[20] The learned High Court judge accepted the respondents' arguments. In essence, the learned High Court judge was of the opinion that the respondents, being the guarantors, had a right over the charged assets, and that right would extend to the proceeds of the sale of the charged assets. The respondents' rights were compromised by the fact that the excess money from the proceeds of the sale was retained by the liquidator for the benefit of other creditors of the borrower, instead of being used to settle the remaining outstanding accrued interest calculated from the date of winding up until the date of full settlement.

Therefore, the learned High Court judge dismissed UOB's claim against the respondents (and Gerald Yeo @ Yeo Ah Khe). The learned High Court judge further allowed the counterclaim filed by Gerald Yeo @ Yeo Ah Khe, the third defendant, in Appeal 1036. Mr Gerald Yeo had sought for a declaration that the guarantee be rescinded and for UOB to deliver the guarantee to be cancelled.

THE FINDINGS OF THIS COURT

[21] The borrower was wound up on 4 December 2015, and based on the prevailing law at that time, s 8(2A) of the Bankruptcy Act 1967 provided that 'no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order'.

[22] As such, UOB, when issuing the redemption statement, could only calculate the accrued interest up to the date of winding up of the borrower because UOB did not realise the charged assets (security assets) within six months from the date of the winding up order on 4 December 2015. The charged assets were not realised or sold, instead the charged assets were redeemed by the liquidator. The liquidator settled the outstanding amount as at the date of the winding up order, ie, as at 4 December 2015.

[23] The question then is whether UOB could pursue a claim against the guarantors for the post winding up accrued interest despite the provision in s 8(2A) of the Bankruptcy Act 1967 for UOB's entitlement to any accrued interest which ceased on the date of winding up if the charged assets were not realised within six months from the date of winding up.

[24] This question has been considered by the Federal Court in *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449. The question of law before the Federal Court was as follows:

> Can a secured creditor in law, claim interest, inter alia, from a guarantor, and/or person whose liability is pursuant to a guarantee and/or indemnity, and/or a third party chargor, after the date of winding up of a borrower company or the receiving order if it does not realise its security within six months of the winding up order or receiving order made against the borrower, as a consequence of s 8(2A) of the Bankruptcy Act 1967 read together with s 4(1) of the Civil Law Act 1956.

[25] The apex court answered the above question of law in the affirmative. The reasons for the decision are found in the following paragraphs of the Federal Court's judgment as follows:

> [14] It must be noted that s 8 of the Act deals with the property or person of the

A debtor against whom a receiving order has been made. Section 8(2) and 8(2A) of the Act deal with what the secured creditor can and cannot do in respect of realising or otherwise dealing with his security where the debtor is concerned. Nothing in these two sections suggests that they govern the properties or persons of parties against whom no receiving order is made.

B [15] It is our finding that the appellant is not the 'debtor' envisaged in s 8(1) of the Act. In this regard, there is no receiving order made against the appellant. As such, s 8(2) does not apply to him. Thus, if s 8(2) is not applicable to the appellant, it follows too that the exception to that section, ie s 8(2A), will also not applicable to him.

C [16] We are further of the view that the appellant's liability, being a person giving the indemnity is primarily separate and independent from any other person. He can be made liable for losses which the principal borrower (Monzo) could not have been made liable. The intent and purpose of s 8(2A) of the Act is to clamp interest claimable by the secured creditor against the bankrupt debtor so as to afford protection to the unsecured creditors of the bankrupt debtor and the bankrupt debtor himself. This is to ensure that the level of debt would not increase, and the share that each unsecured creditor has on the assets of the debtor would not be diminished.

D

E **[26]** Thus, applying the principle that was enunciated by the Federal Court in *Andrew Lee*, this court takes the view that the limitation set out in s 8(2A) of the Bankruptcy Act 1967 does not extend to a guarantor's liability. The guarantor's liability is primarily separate and independent from the borrower/debtor. In that case, the Federal Court had explained that 'the intent

F and purpose of s 8(2A) of the Act is to clamp interest claimable by the secured creditor against the bankrupt debtor so as to afford protection to the unsecured creditors of the bankrupt debtor and the bankrupt debtor himself. This is to ensure that the level of debt would not increase, and the share that each unsecured creditor has on the assets of the debtor would not be diminished'.

G Hence, the underlying purpose of the section is to protect the unsecured creditors of the bankrupt debtor, not a guarantor or surety.

[27] In coming to its decision the Federal Court had also considered the

H letter of guarantee and indemnity which was signed by the guarantor in that the contents of the guarantee clearly show the intention of the parties for the guarantor(s) to undertake the liability for the repayment of the term loan and interest therein not merely as sureties but also as a principal debtor(s) as well as indemnifier(s).

I **[28]** In our present case, the respondents (and Gerald Yeo @ Yeo Ah Khe) were not just sureties in law. They were, contractually, principal debtors of UOB. This is clearly reflected in cl 19 of the guarantee which states as follows:

19 PRINCIPAL DEBTOR

19.1 Although, as between Us [the respondents (including Gerald Yeo @ Yeo Ah Khe)] and the Customer [the Borrower], We are sureties, that is, persons who have agreed to be responsible for the liabilities and obligations of the Customer, We agree that, as between You [UOB] and Us, We are to be deemed and to be treated in every way as principal debtors in respect of all the moneys, liabilities and obligations guaranteed by this Guarantee. We therefore also agree that Our liability under this Guarantee shall not be discharged or affected in any way whatsoever by anything whatsoever which would not discharge Our liability if We had in fact been the principal debtors.

[29] The legal relationship that the respondents (and Gerald Yeo @ Yeo Ah Khe) had with UOB was not just as guarantors/sureties for the borrower to repay any amount outstanding to UOB. Rather, the respondents (and Gerald Yeo @ Yeo Ah Khe) had also assumed the responsibility to repay the amount outstanding as principal debtors. Further, the respondents (and Gerald Yeo @ Yeo Ah Khe) were not protected under s 8(2A) of the Bankruptcy Act 1967, as they do not fall within the meaning of 'debtor' as envisaged under the law (see para 15 of the apex court judgment in *Andrew Lee*).

[30] Applying the above legal propositions as set down by the Federal Court and based on the plain meaning of the terms in the guarantee, the respondents (and Gerald Yeo @ Yeo Ah Khe), being principal debtors, could not disclaim their responsibilities and liabilities for the outstanding post winding up accrued interest as claimed by UOB.

[31] For the above reason alone, ss 92 and/or 94 of the Contracts Act 1950 could not avail the respondents (and Gerald Yeo @ Yeo Ah Khe). This is because they were not just sureties for the borrower, but were the principal debtors as well.

[32] Sections 92 and 94 of the Contracts Act 1950 read as follows:

92 Discharge of surety by creditor's act or omission impairing surety's eventual remedy

If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

94 Surety's right to benefit of creditor's securities

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract od suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

[33] The above sections clearly protect only the interest of a surety; they do not protect the interest of a surety who has also assumed the responsibility as a principal debtor.

[34] Further, cl 20.1 of the guarantee fortifies the right of UOB to recover the post winding up accrued interest against the respondents (and Gerald Yeo @ Yeo Ah Khe), particularly cl 20.1.4 which states as follows:

> 20.1 Independently of anything contained in this Guarantee, and as a separate promise to You [UOB], We [the respondents and Gerald Yeo @ Yeo Ah Khe] agree that any moneys which You may not be able to recover from Us on the basis of this Guarantee because of:
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> ...
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> 20.1.4 any legal or other limitation, disability or incapacity on the part of the Customer [Borrower];
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> ...
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> will still be capable of being recovered from Us as Your only or principal debtor and will be paid by Us on demand. We now give You Our unconditional undertaking to indemnify You in full and to keep you fully indemnified against all loss, damage, liabilities, costs and expenses whatsoever which You may suffer or incur as a result of or arising from the Banking Facilities which You are now, or at any time later, granting to the Customer; We agree We will not revoke or recall this Undertaking of Ours under any circumstances.

[35] Clearly, based on the above clause, in the event UOB could not recover from the respondents on the basis of the guarantee for the reason of any legal or other limitation, disability or incapacity on the part of the borrower, UOB could still recover from the respondents (and Gerald Yeo @ Yeo Ah Khe) as UOB's principal debtors and they had to pay UOB on demand. Therefore, the respondents (and Gerald Yeo @ Yeo Ah Khe) are liable for the post winding up accrued interest.

[36] With regard to the issue raised by the respondents (and Gerald Yeo @ Yeo Ah Khe) that the respondents' subrogation rights to claim against the balance of the proceeds had been deprived under s 94 of the Contracts Act 1950, we are of the considered view that s 94 could not avail the respondents for the reason that they are not merely sureties for the borrower, but were also principal debtors who stood side by side with the borrower. The application of s 94 is purely to safeguard the interest of a surety, not a surety who held himself to be a principal debtor as well.

[37] Further, when UOB released the charged assets, it was by way of a redemption. UOB did not lose or part with the charged assets as security, but

rather UOB reassigned or 'returned' the charged assets to the borrower when the borrower paid the redemption amount.

[38] UOB did not have any right to retain or claim interest over the excess money from the proceeds of the sale, because UOB was not the party involved in the sale, it was the liquidator who carried out the sale. The learned High Court judge relied on *Fisar bin Hj Abdullah v Malayan Banking Bhd* [2015] 1 MLJ 867 and other authorities to find that UOB's action in releasing the charged assets by way of redemption was clearly inconsistent with the rights of the respondents under s 92 and 94 of the Contracts Act.

[39] This court has examined all the cases and is of the considered view that those cases relied on by the learned High Court judge can be distinguished. The respondents (and Gerald Yeo @ Yeo Ah Khe) in the present case were not just sureties, they were principal debtors. On this score, this court could not agree with the finding of the learned High Court judge.

[40] In short, once it is established that a guarantor is no longer just a surety for a borrower, but also a principal debtor of the bank, the protections afforded to a surety under the Contracts Act 1950 would not apply.

[41] In relation to the legal principle enunciated in the Federal Court decision in *Pilecon Realty Sdn Bhd v Public Bank Bhd & Ors and another appeal* [2013] 3 MLJ 1, this court finds that the apex court did not extend the limitation of the enforcement of post winding up accrued interest to a guarantor who had assumed responsibility as a principal debtor. As such, the learned High Court judge's finding that UOB's delay in the appointment of the R&Ms and UOB's failure to dispose of the charged assets constituted a breach of the duty owed to the respondents (and Gerald Yeo @ Yeo Ah Khe) was misconceived.

[42] Based on the above reasons, this court is of the view that the learned High Court Judge had erred in law in holding that UOB's delay in appointing the R&Ms, UOB's failure to dispose of the charged assets, and UOB's failure to retain the excess of the proceeds of the sale had resulted in the respondents' interests being compromised and prejudiced, which thereby discharged the respondents' duties and responsibilities as guarantors.

[43] The learned counsel(s) for the respondents (and Gerald Yeo @ Yeo Ah Khe) had raised issues concerning the conduct of UOB and the R&Ms prior to and after the redemption of the charged assets.

[44] This court finds those issues raised do not deal with the heart of the UOB's claim, and that those issue raised were outside the parties' contractual

obligations. For example, the respondents (and Gerald Yeo @ Yeo Ah Khe) asserted that UOB was in breach of its duty for failure to retain the balance of the proceeds of the sale of the charged assets. This court could not agree with the respondents' assertion simply because UOB was not a party to the sale of the charged assets.

[45] UOB had no right to the proceeds of the sale of the charged assets. The liquidator on behalf of the borrower was the recipient of the sale proceeds as well as the balance of the proceeds after settling the redemption sum. UOB could not in any manner be in breach of any contractual obligation with respect to the sale proceeds in the given circumstances.

[46] The respondents (and Gerald Yeo @ Yeo Ah Khe) could seek indemnity from the liquidator under s 98 of the Contracts Act 1950, because the relationship between the respondents (and Gerald Yeo @ Yeo Ah Khe) and the borrower remains as surety and principal debtor.

CONCLUSION

[47] For the reasons stated above, we allowed UOB's appeals (ie, Appeal 1036 and Appeal 2037) and set aside the High Court order dated 10 May 2022. Further, we dismissed the cross-appeal in Appeal 1036.

[48] We made the following consequential orders:

(a) UOB's claim per para 17(a) and (b) of the amended statement of claim dated 21 August 2018 is allowed and judgment is entered accordingly against D1, D2 and D3. D3's counterclaim is dismissed;

(b) costs of RM125,000 (subject to allocatur) against the respondent (Gerald Yeo @ Yeo Ah Khe) in Appeal 1036 as costs here and below;

(c) costs of RM100,000 (subject to allocatur) against the respondents in Appeal 1037 as costs here and below; and

(d) the costs ordered by the High Court and which have been paid by UOB to the respondents in the respective appeals are to be refunded to UOB by 26 September 2024.

UOB's appeal allowed, High Court's decision set aside and judgment against guarantors entered.

Reported by Ashok Kumar